

BOOK REVIEWS

International Civil Litigation in United States Courts: Commentary and Materials

By Gary B. Born and David Westin. Deventer, The Netherlands, and Cambridge, Massachusetts: Kluwer Law and Taxation Publishers, 2d ed. 1992, pp. xxvi, 928 (including appendices), \$85.00.

International Litigation and Arbitration

By Andreas F. Lowenfeld. St. Paul, Minnesota: West Publishing Co. (American Casebook Series), 1993, pp. xxvi, 869, \$45.95 (with a separately bound volume of SELECTED TREATIES, STATUTES AND RULES, pp. vii, 277, \$14.95).

Lawyers and law students unacquainted with international law may be tempted to think that it is as dry as dust, but the compelling episodes of international litigation set forth in the books reviewed below suggest that this view is misguided. During an interlude in the background work for this review, I had the diverting experience of reading John Mortimer's review of a new biography about the late publisher Robert Maxwell.¹ The review's excellence caused me some regret, first because of my well-founded conviction that I could never write a review ably enough to be permitted to refill John Mortimer's inkwell, and also because of my expectation that the lengthy books I was about to review would fail to present any subjects as meaty as "Captain" Bob Maxwell and his exploits.

1. John Mortimer, *Call Him Irresistible*, THE NEW YORKER, May 31, 1993, at 163. Mortimer conjures up the subject with great clarity, if not much charity: "the monstrous creation that was the late, unlamented Mr. Robert Maxwell," a "liar and a fraud," a "sadistic tyrant . . ." are samples. *Id.* at 163. An acute aversion to odiousness permeates the piece, and rarely has the maxim *de mortuis nil nisi bonum* been trampled on with such vigor.

The regret was only half justified, because almost immediately upon returning to work on this review I encountered the tale of a grotesque escapade revolving around claims that Maxwell had engaged in a major fraud in the sale to a Saul Steinberg company of Pergamon Press Limited stock.² To be sure, these particular Maxwell proceedings might have held scant interest for Mr. Mortimer's Rumpole, for the battle unfolded in civil courts without any indication in the case reports of a need for the services of an "Old Bailey hack." Yet despite my pessimistic expectations, here the central figure of the Mortimer review loomed once again, large as ever, in an international law book. And what a story it was: flights to London, flights to New York, meetings in hotel rooms, obedient minions, dark deeds alleged, millions at stake. In short, materials in the books under review illustrate that issues of international law do not arise in a laboratory environment but frequently occur as a result of real disputes involving formidable stakes and clashes between people who have been operating on a scale beyond the mundane. This is not to say that these books are entertainment. They are works of solid scholarship, but each has succeeded ably in making the subject matter seem anything but arid.³

Considerations of international law continue to play a substantial role in civil litigation in the United States, a phenomenon reflected by cases noted in the works under review. In the last decade, for example, the Supreme Court of the United States has issued judgments in numerous cases dealing with a variety of international civil litigation problems.⁴ The federal courts of appeals and the district

2. See Lowenfeld, p. 68 (The Search for Criteria), which presents *Leasco Data Processing Equip. Corp. v. Maxwell*, 468 F.2d 1326 (2d Cir. 1972).

3. The authors collectively offer much more than *Maxwell*, for example, the *Marc Rich* litigation, in which steamer trunks full of documents being sought by the authorities were about to be spirited out of the country by a paralegal, when the plane on which they were loaded was stopped at the last moment before takeoff by the Kennedy Airport tower, and the documents were seized back at the gate (see Lowenfeld, p. 801); the litigation aftermath of the U.S. Government's post-World War II seizure of the assets "of the notorious I.G. Farben enterprise which had been one of the main engines of the German war machine" (Lowenfeld, p. 694); "the most tragic industrial disaster in history" (Born & Westin, p. 307, quoting *In re Union Carbide Corp. Gas Plant Disaster*, 634 F. Supp. 842 (S.D.N.Y. 1986), which is excerpted there); efforts to redress "a cold-blooded assassination on Massachusetts Avenue in Washington of the [former] foreign minister of Chile" (Lowenfeld, p. 661; see *Letelier v. Republic of Chile*, 748 F.2d 790 (2d Cir. 1984), *cert. denied*, 471 U.S. 1125 (1985); see also Born & Westin, pp. 519-22); and the ports of Nigeria becoming "bottlenecked with hundreds of ships carrying cargoes of cement" improbably ordered by that country in the mid-1970s (Born & Westin, p. 465, quoting *Verlinden B.V. v. Central Bank of Nigeria*, 488 F. Supp. 1284 (S.D.N.Y. 1980), which is excerpted there).

4. A nonexhaustive list includes *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480 (1983) (jurisdiction in suits by foreign parties under the Foreign Sovereign Immunities Act); *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408 (1984) (in personam jurisdiction); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) (New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards); *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102 (1987) (in personam jurisdiction); *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court*, 482 U.S. 522 (1987) (Hague Evidence Convention); *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694 (1988) (Hague Service Convention); *W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp.*, 493 U.S. 400 (1990) (act of state doctrine); *Carnival Cruise Lines, Inc. v.*

courts, as well as state courts, have been similarly busy with the impact of international issues on civil litigation over the same period.

Even from the nation's beginning, international issues have been addressed by U.S. courts. Indeed, the 1812 case of *The Schooner Exchange v. McFaddon*⁵ (a sovereign immunity decision) is "one of the early instances of the influence of the U.S. Supreme Court on the rest of the world."⁶ As the nation expanded to the west, the likelihood diminished that a substantial percentage of U.S. lawyers or their clients would have encounters with international law. Some lawyers near the seaboard might deal with maritime law and international trade, but few inland attorneys ordinarily would have the same opportunities.

The radically advanced transportation, communications, information, and investment systems of the present era have of course transformed this scene. No longer is the impact of international law remote or irrelevant. Today it is not unusual for a German or Japanese company to explore opening a new facility in mid-America and fly its experts to the heartland to negotiate with local officials. With the generally contemporaneous, if coincidental, growth in the modern internationalization in commerce and the development of products liability law, it is not particularly surprising when an injury in Boise or Binghamton results from a product manufactured abroad. The local bar and bench then apply themselves to acquire, for legal proceedings in their own states, the requisite learning with regard to international issues such as jurisdiction, discovery, service of process, and enforcement of judgments. Moreover, sales contracts, turnkey projects, and other agreements with increasing frequency will present local lawyers throughout the country with a variety of international issues, such as forum selection and long-arm jurisdiction. And these situations are only illustrative.

International law need not be a forbidding unknown to a civil litigator in the United States. In approaching a number of aspects of international law, lawyers trained in the U.S. legal system enjoy a potential advantage of which they may be largely unaware. Many of them have already studied, or have had practical exposure to, problems that entail, on a purely domestic level, conflict of laws, forum selection, sovereign immunity, personal jurisdiction for acts outside the forum, and discovery-taking outside the forum. Minus the unifying overlay of federalism, these concepts and more are also familiar in international civil litigation, though often dressed in substantially different clothing. To be familiar with the domestic version of these concepts does not make one a fully versed international litigator (and to be under that illusion is dangerous). A significant part of the basic learning of a U.S. lawyer can, however, be of help in gaining an

Shute, 499 U.S. 585 (1991) (forum selection clauses); *Republic of Argentina v. Weltover, Inc.*, 112 S. Ct. 2160 (1992), and *Saudi Arabia v. Nelson*, 113 S. Ct. 1471 (1993) (foreign sovereign immunity); *Smith v. United States*, 113 S. Ct. 1178 (1993) (extraterritorial effect of U.S. statute).

5. 11 U.S. (7 Cranch) 116 (1812).

6. Lowenfeld, p. 583.

understanding of international law as it bears on U.S. litigation. The situation is perhaps comparable to learning a foreign language that shares a sizeable portion of its vocabulary and grammar with one's native language: fluency in one's native language will not translate to fluency in the new language, but it can provide a good head start.

In addition to this built-in edge held by many U.S. civil trial lawyers are the opportunities afforded by the literature in the field. Works such as those reviewed here are indispensable aids to litigators who desire to become more conversant with the aspects of international law that may come into play in their practices.

Each of the books warrants separate discussion. Their aggregate length and detail rule out a page-by-page or citation-by-citation critique, and accordingly this review considers them from a wider perspective.⁷ This discussion of the respective books can do no more than focus on aspects of their individual treatment of selected topics, which will give the reader at least a sample on which to base an assessment.

I. Born and Westin

This book is the second edition of a well-received work⁸ that in this edition has become even better.⁹ The discussion is detailed, thorough, and liberally footnoted. The writing is clear and fresh.

Born and Westin aim their book at both private practitioners and law school professors. Thus, it offers a varied menu to readers. It unites the text of a standard treatise with case extracts and with problems that are typical of those presented in casebooks, which invite the reader to become engaged more deeply in considering the questions under discussion. The chapters and subchapters typically begin with an extensive analysis and discussion of the background of the issues presented and of the state of the law on the subject under discussion, and proceed to present portions of important cases. Thoughtful questions and useful critiques are then put forth for the consideration of readers who have an interest in the subject matter beyond that which can be satisfied by merely skimming the book for black-letter law.

7. It is not this review's purpose to engage in a "gotcha" game of highlighting the rare misnumbered footnote or infelicitous citation. This kind of niggling is undeserved in the case of works so conspicuous for their overall careful attention to detail.

8. See *Saudi Arabia v. Nelson*, 113 S. Ct. 1471, 1478 (1993), and *Hartford Fire Ins. Co. v. California*, 113 S. Ct. 2891, 2909 n.22 (1993).

9. The authors were partners in a Washington law firm when the first edition was published. David Westin is now senior vice president and general counsel of Capital Cities/ABC, Inc. in New York. Gary Born is now in London as managing partner of his firm's office there. Each is a prolific writer, and much in demand as a panelist and speaker in the field of international law as it relates to civil litigation in the United States. Each has dealt in practice with substantial international litigation, including *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court*, 482 U.S. 522 (1987), and each has been chair of the International Aspects of Litigation Committee of the American Bar Association's Section of International Law and Practice.

Chapter 1 presents a general introduction outlining the book's purpose and scope. It also gives an informative version of public international law and its relationship to U.S. law in international civil litigation. Chapter 2 deals with judicial jurisdiction of U.S. courts and treats a comprehensive range of jurisdictional issues, such as long-arm jurisdiction, general jurisdiction, transitory presence, "tag" service, national contacts, and in rem and quasi in rem jurisdiction. Ten cases (among them, *World-Wide Volkswagen v. Woodson*,¹⁰ and *Asahi Metal Industry Co. v. Superior Court*¹¹) are excerpted.

Most of the case extracts are followed by further discussion under separate topic headings helpful in their specificity,¹² and by numerous questions for individual or classroom consideration.¹³ Chapter 3, Service of Process Abroad, includes the Hague Service Convention and the Inter-American Convention on Letters Rogatory as well as case extracts. Supplemental discussion and questions follow the cases.

In chapter 4, Forum Selection, the authors discuss the interpretation of forum selection clauses, including issues of exclusivity, scope, and choice of law. The chapter provides sample texts of typical forum selection clauses (pp. 231-32). Also in this chapter is the authors' treatment of forum non conveniens and parallel proceedings, including injunctions against foreign litigation.

The authors display their considerable learning and practical knowledge concerning the problems of transnational discovery in chapter 5, Taking Evidence Abroad. Their treatment covers issues pertaining to taking discovery in the absence of a treaty, such as the background and evolution of the standards of section 442 of the *Restatement (Third) of the Foreign Relations Law of the United States*. This chapter also deals comprehensively with discovery under the Hague Evidence Convention and the aftermath of *Société Nationale Industrielle Aérospatiale v. U.S. District Court*.¹⁴ Impressive depth in this field is evident throughout the chapter, including in the questions posed (among them, whether state courts have the "power . . . to go beyond the minimum standard of deference to foreign interests established by the *Aérospatiale* Court. For example, could a state court conclude that international comity requires first use of the Convention in all

10. 444 U.S. 286 (1980).

11. 480 U.S. 102 (1987).

12. E.g., "Rationale for national contacts standard under the due process clause." (p. 105)

13. E.g., "How did the *Asahi* Court resolve [the] issue" of "whether the same limitations on personal jurisdiction should apply to foreigners as are applied to U.S. citizens." (p. 92)

14. 482 U.S. 522 (1987). As with many other principal sections of the book, the authors begin the section on the Evidence Convention with a footnote referring the reader to "extensive commentary" in the field. Thus, they note (p. 411 n.129):

There is extensive commentary on the Hague Evidence Convention. E.g., Prescott & Alley, *Effective Evidence-Taking Under The Hague Convention*, 22 Int'l Law. 939 (1988); Muse, *Discovery in France and the Hague Convention: The Search for a French Connection*, 64 N.Y.U.L. Rev. 1073 (1989); Born & Hoing, *Comity and the Lower Courts: Post-Aérospatiale Applications of the Hague Evidence Convention*, 24 Int'l Law. 393 (1990); Weis, *The Federal Rules and the Hague Conventions: Concerns of Conformity and Comity*, 50 U. Pitt L. Rev. 903 (1989)

More than fifteen other references in n.129 are omitted for reasons of brevity.

cases?") (p. 437).¹⁵ The final chapters of the Born and Westin book cover foreign sovereign immunity (chapter 6), jurisdiction in international litigation (both subject matter and extraterritorial legislative jurisdiction) (chapter 7), the act of state doctrine (chapter 8), and the recognition and enforcement of foreign judgments (chapter 9). With respect to the act of state doctrine, Born and Westin includes the following text and questions (pp. 664-65), which are illustrative of the book's approach throughout in discussing cases it has presented:

The *Sabbatino* Court held that the act of state doctrine is a rule of federal common law, binding on federal courts in both federal question and diversity cases. The Court reasoned that *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), did not require application of state law act of state rules because of the federal interest in the Nation's foreign affairs. The Court also indicated that state courts would be required to apply an act of state rule at least as deferential to foreign interests as the federal act of state doctrine, 376 U.S. at 425 n.23. Subsequent state court decisions have done so. [Citations omitted.]

. . . . What is the constitutional basis for federal courts to require state courts to obey the rule of federal common law enunciated in *Sabbatino*? There is, of course, no "act of state" statute. What permits federal courts not merely to dispense with *Erie R.R. Co. v. Tompkins*, but also to fashion rules of federal common law binding on state courts? The Court in *Sabbatino* declares that "an issue concerned with a basic choice regarding the competence and function of the Judiciary and National Executive in ordering our relationships with other members of the international community must be treated exclusively as an aspect of federal law," because of the federal interests that "the rules of international law should not be left to divergent and perhaps parochial interpretations" and in ensuring that U.S. judicial proceedings do not "hinder rather than further this country's pursuit of goals . . . in the international sphere." Is this persuasive?

The act of state doctrine articulated in *Sabbatino* is one of the leading examples of federal common law in the international context. . . .

Accepting the general power of the judiciary to fashion rules of federal common law, is the act of state doctrine articulated in *Sabbatino* an appropriate exercise of this authority? Does the risk of "divergent and perhaps parochial [state court] interpretations" in international cases justify a rule of federal common law? As noted elsewhere, cases involving foreigners almost always raise issues of state law, whose interpretation by state courts may well be divergent and perhaps parochial. Note that the Court appears concerned by the danger of divergent and parochial interpretations of "international law." Is there a special need for uniform interpretations of international law by U.S. courts? Why?

The Born and Westin book's final chapter considers the enforcement of judgments—one of international litigation's perennial hot topics—from the standpoint of comity and the traditional exceptions to the enforcement of judgments, public policy, and jurisdiction. The chapter also briefly discusses the Brussels Convention.

More than 100 pages (pp. 789-905) of appendices (A through L) follow the final

15. Born & Westin's treatment of this issue (as well as of other issues) was recently acknowledged in *Knight v. Ford Motor Co.*, 615 A.2d 297, 302 n.12 (N.J. Super. Ct. Law Div. 1992), which held that under the facts of that case the Hague Evidence Convention should be the procedure of first resort for discovery against a German corporate defendant.

chapters. These appendices include the texts of the Hague Service Convention and the Hague Evidence Convention (and declarations under those conventions), the Inter-American Convention, and the Foreign Sovereign Immunities Act. The book has an extraordinarily detailed table of contents.

II. Lowenfeld

An English High Court judge has justly described Andreas F. Lowenfeld, a noted professor at the New York University School of Law, as "a person of the greatest academic distinction," whose expertise includes such fields as jurisdiction and judgments.¹⁶ Professor Lowenfeld's book is not, however, a mere display of academic learning. It reflects the author's extensive practical experience in international law. He has achieved his twin goals (pp. v, vii) of writing a book that will both appeal to teachers and be useful to practicing lawyers. The book starts with public policy and the conflict of laws (chapter I), and continues with jurisdiction to prescribe (chapter II), judicial jurisdiction (chapter III), international arbitration (chapter IV), enforcement of foreign judgments (chapter V), the act of state doctrine (chapter VI), foreign sovereign immunity (chapter VII), and discovery of information located abroad (chapter VIII). The book's usefulness is greatly aided by its excellent index and table of cases.

At the outset, Professor Lowenfeld points out that to some degree, "the book offers an advanced course in civil procedure" and that it "also presents conflict of laws in a transnational setting, and aspects of public international law, international economic law, and comparative law and procedure" (p. v). The author is not hesitant to offer his own comments and suggestions and to raise questions, but is careful to distinguish his own views about what the law should be from what the law is.

The introduction to the international arbitration chapter (chapter IV) is illustrative of the type of illuminating textual treatment in which Lowenfeld's book is rich (pp. 343-44 (footnotes omitted)):

In June of 1958, after many years of negotiation, a convention was signed at the United Nations in New York concerning arbitration between private persons, "whether physical or legal." The Convention was slow in gaining support. Neither the United States nor the United Kingdom initially signed the Convention, and they did not accede to the Convention until 1970 and 1975 respectively. Thereafter most states that had held back (except some of the Latin American states) joined up. As of August 1992, some 89 states, including nearly all major commercial states, had become parties.

The basic idea of the New York Convention was to make arbitral awards rendered in a foreign state enforceable in any state party to the Convention. Without such a convention, it had often been difficult or impossible to enforce an arbitral award outside the state in which the arbitration had taken place, where defendant might well not be established or have assets. In order to enforce in state *Y* an award made in state *X*, it

16. Lowenfeld, p. 780, quoting *X.A.G. v. A Bank*, [1983] 2 All E.R. 464, [1983] 2 Lloyd's Rep. 535 (Q.B. 1983).

was often necessary to bring an action in *X* on the award and then to bring an action in *Y* on the judgment of the *X* court. The New York Convention cuts through this procedure, and provides, in Article III, that each Contracting State "shall recognize" arbitral awards made in foreign states on the same basis as it recognizes and enforces domestic awards.

The chapter's thoughtful comments and questions placed after the case extracts are also typical of those in the other chapters, and the following are three examples (pp. 365 (footnotes omitted), 366, 367):

Most commentators have criticized the holdings in *McCreary* and *Cooper*. For the most part, however, courts in the United States have declined to permit pre-award attachment in connection with international arbitrations, except in maritime claims. In England it now appears possible to secure a *Mareva* injunction in aid of an arbitration pending, or about to be initiated, in the United Kingdom, but not—at least as of year-end 1991—if the arbitration is pending elsewhere. As we saw in Chapter III, the Swiss *forum arresti* is available to secure an arbitral award, regardless of where the arbitration is pending, if the other conditions for that device are satisfied.

The *Audi-NSU v. Petit* case is in many ways like *Mitsubishi*, in that in both cases it is contended that a local law for protection of automobile dealers from the major manufacturers can achieve its goal only if it is interpreted to be outside the permissible scope of arbitration. Of course *Mitsubishi* reached the U.S. Supreme Court in the context of Article II of the Convention, *Audi* in the context of Article V, but in both cases the issue is whether the matter is capable of being arbitrated. Which is the sounder result?

To round out this chapter, one more question should be asked: If in negotiating a transnational commercial agreement there is opportunity to insert a forum selection clause, would you favor a judicial, or an arbitral forum? Of course, as the question is stated, without any information about the nature or duration of the agreement, the relation of the parties to each other, and whether one's client is more likely to be a plaintiff or a defendant, it is hard to give a meaningful response. Even if one has all of this information, one additional element must be considered before responding to the question—how judgments rendered in one country are enforced in other countries. We explore this subject in the next chapter.

Among the notable assets in Lowenfeld's book are the comparative law sections. For example, with respect to the recognition and enforcement of judgments, the author presents not only U.S. law but also discusses the state of the law in Europe under the Brussels and Lugano Conventions, and sets forth decisions of the European Court of Justice (pp. 420-36). Similarly, on the subject of discovery, Lowenfeld addresses English law and civil law on fact-gathering, which provides a useful overview for the uninitiated. By way of illustration, Lowenfeld states in part concerning the civil law system (pp. 670, 671 (footnote omitted)):

Discovery as understood in the common law—whether in the American or in the English version—does not exist in the civil law system. Neither, in most civil law countries, does the trial in civil (as contrasted with criminal) litigation, in the sense of a consecutive period of time when witnesses give oral evidence in open court, first for one side, then for the other. Though the principle of confrontation, i.e., of an adversary proceeding before a neutral decision-maker, is maintained in all civil law countries, the emphasis is much more on documentary proof of fact than on oral evidence, and much

more on the responsibility of each side to gather its own evidence than on the obligation of disclosure by the two sides to one another or participation by strangers to the controversy.

Typically, pleadings (two rounds for each side) are much more detailed than in the United States or England. Factual assertions are set out as precisely as possible, and are accompanied by a statement of how the assertion is to be established, normally by reference to a document that is attached or is promised to be supplied, but also by testimony of named witnesses (usually not by the parties themselves).

In principle, it is the judge (or one member of a collegial court) who is in charge of gathering the evidence. The judge, not the parties, may summon witnesses to testify, and the judge, not counsel, conducts the questioning. While counsel for both sides are normally present when a witness is heard, and while counsel may suggest questions to the judge, cross-examination in the Anglo-American model is not practiced in civil litigation.

As for production of documents, most cases proceed on the basis of exchange of documents between the parties; generally a party may not rely on a document not included in its pleading file. The judge may, on his or her own motion or on application of a party, order another party or a third person to produce documents if they are relevant to an issue necessary for decision and are described with specificity. But applications to the judge to order production of documents must be specific, or supported by selected evidence.

The accompanying separately priced volume of *Selected Treaties, Statutes, and Rules* is a vital resource to be used in conjunction with the main volume. Moreover, Professor Lowenfeld has prepared *Teacher's Manual and Supplemental Litigation Problems*, which is available from the publisher to instructors using the casebook in the classroom.

III. Comparisons and Conclusions

Each of the books reviewed here is a major work, and a welcome contribution to the growing body of impressive writing in the field of international litigation. They have been brought forth by authors of great distinction and authority in international law, and the content is uniformly first-rate. Born and Westin's book is more than a treatise, for it includes many features of a casebook. Lowenfeld follows the format of a standard casebook, but his liberal amounts of illuminating explanatory text make it more than a casebook. Each book contains dual strengths: cogently presented black-letter law and materials that enable the reader to delve more deeply and analytically into the key topics.

The two books share a number of elements. Their format, scope, and purposes differ, but not surprisingly, they include most of the same topics. Thus, each book covers such core international civil litigation subjects as judicial jurisdiction, prescriptive jurisdiction, forum selection, service of process, taking of evidence abroad, acts of state, foreign sovereign immunity, and enforcement of judgments. Among some differences in coverage and emphasis are that Born and Westin's book deals with service of process under the Hague Service Convention more extensively than does Lowenfeld's, whereas non-U.S. law generally is addressed more extensively by Lowenfeld than by Born and Westin.

The two books, understandably, have reasonable differences in organization. For instance, Born and Westin excerpt and discuss *Laker Airways Ltd. v. Sabena, Belgian World Airlines*¹⁷ in the forum selection chapter, under the heading "Parallel Proceedings," whereas Lowenfeld excerpts in his chapter on jurisdiction to prescribe.

To summarize, each of these works is a remarkably significant and comprehensive contribution to the understanding of issues in international law that have come to have increasing importance in U.S. litigation. Each of them will effectively assist in the study and practice of law concerning those issues. They show that international law need not be remote, impenetrable, or dull to the U.S. lawyer. To a considerable extent they happen to complement each other very well, but each book has no difficulty standing on its own. Each book's lucid analyses and thought-provoking questions make it a useful and instructive work that undoubtedly deserves a valued place in the offices of civil litigators and in the classrooms of aspiring litigators.

Edwin R. Alley¹⁸

Nauru: Environmental Damage Under International Trusteeship

By Christopher Weeramantry. Melbourne, Australia: Oxford University Press, 1992, pp. xx, 448, \$72.00.

On August 10, 1993, the Australian prime minister, Paul Keating, and the president of the island Republic of Nauru, Paul Dowiyogo, signed an out-of-court settlement of a suit brought by Nauru in the International Court of Justice. Nauru demanded compensation for environmental damage brought about by the Australians during the colonial period. Australia agreed to pay \$US73 million to rehabilitate the island.¹ *Nauru: Environmental Damage Under International Trusteeship* sets the stage for that case.

The coral island of Nauru, some eight square miles in size, sits alone, just south

17. 731 F.2d 909 (D.C. Cir. 1984).

18. Judge of the Superior Court of New Jersey. This review expresses the personal views of the writer and not those of the New Jersey judiciary, and of course, these views are not binding on the judiciary.

1. *Nauru: Rocky Road to Recovery for Ravaged Pacific Island*, INTER PRESS SERVICE, Aug. 10, 1993, available in LEXIS, Nexis Library, INTER PRESS SERVICE File [hereinafter *Rocky Road*].

of the equator in the Central Pacific, more or less to the north of Vanuatu and the Solomon Islands. Nauru is home to about 8,000 people. A little more than half of the population are of Nauruan (Micronesian) stock. The remainder consists of a mixture of other Pacific islanders—Melanesian and Polynesian—some Chinese, and some Europeans. When the European powers were dividing up the small islands of the Pacific late in the nineteenth century, they found Nauru to be blessed, or cursed, depending upon your point of view, with phosphate deposits ideal for the production of fertilizer. These deposits were among the richest in the world. Nauru was, accordingly, annexed to the German Empire in 1888 and exploitation of the phosphate began.

The German administration surrendered to Australian forces in November of 1914. With the end of the War to End All Wars, the victors decided that they would not annex Nauru as a spoil of victory. Instead they placed it under the Mandates System of the League of Nations. Early in 1919 negotiations began among Great Britain, Australia, and New Zealand, the three powers most closely interested in Nauru's future and its resources. If Weeramantry is right, those powers were cheerfully sharing out the spoils. Ultimately, in December 1920, the League would confer on "His Britannic Majesty" a mandate to be exercised jointly by the three governments. In practice, however, the three powers had already finalized the basic deal that would govern Nauru (aside from a period of Japanese occupation during the Pacific War) until its eventual independence on January 31, 1968. No one consulted the Nauruans. The three powers called the deal the Nauru Island Agreement of 1919. Under this agreement the three governments decided that they alone would be entitled to the phosphates of Nauru, supplied to them at cost rather than at the international market price. The key administrative entity envisaged by this agreement was called the British Phosphate Commissioners.² The phosphate deposits were to be worked and sold under the direction of three commissioners—one appointed by each government. The agreement also provided that the administration of the island would be vested in an administrator, appointed by the Australians, to whom the other two powers delegated the day to day running of the venture. In reality, the commissioners controlled the only significant commercial enterprise in the trust, and thus were able to call the shots. When it suited them, the partner governments used the facade of the commissioners (their own creation after all) to shield them from

2. For a fascinating study of the commissioners, see MASLYN WILLIAMS & BARRIE MACDONALD, *THE PHOSPHATEERS: A HISTORY OF THE BRITISH PHOSPHATE COMMISSIONERS AND THE CHRISTMAS ISLAND PHOSPHATE COMMISSION* (1985). In addition to Nauru, the commissioners ultimately extracted phosphate from Banaba and Christmas Island. The Banabans, a mere colony rather than a Trust Territory, thought the powers had taken advantage of them. They took their chances in the English courts where the judge offered some strong words about the over-reaching of the colonial power, but found no legal principles under English law upon which to base relief for the Crown's breach of fiduciary duty. *Tito v. Waddell*, [1977] 3 All E.R. 129. As will be seen below, the Nauruans placed their faith on international law.

accountability to the League and the United Nations—and ultimately to the Nauruans. With the demise of the League of Nations the territory came under the United Nations Trusteeship, but the same basic arrangement continued.

As Weeramantry describes, during the mandate and trusteeship periods the island exported some 34 million tons of phosphate, leaving about one-third of the plateau that represents the main habitable land on the island totally unusable. (The dust jacket of his book contains an amazing photograph of the surface-of-the-moon style coral pinnacles that remain after extraction.) Nauruans received but a small fraction of the proceeds of sale. Those proceeds were, moreover, much less than the phosphate would have obtained on the open market. Phosphate moneys paid for the administrative costs of the island. The money also paid for machinery and equipment—which Nauruans had to buy back from the phosphateers as part of the agreement leading to independence! In short, the whole “trust” relationship looks very much like one of simple exploitation.

Since independence in 1968, the Government of Nauru has controlled the phosphate industry, “and phosphate has been mined since then on the basis of a clear acceptance by the government of its obligation to restore to a usable condition the land mined.” (p. xiii) Since resources are likely to run out in the next few years, and with them a substantial income, there is some urgency in planning for the future. Offers of resettlement by the administering powers did not work out, and the future of the Nauruans seems, as a practical matter, to be bound up with rehabilitation. (While the Government of Nauru has been doing much better in terms of phosphate price and has acquired substantial investments in the period since independence, some of those investments have been disastrous.³)

In December 1986 the Government of Nauru appointed a three-person Independent Commission of Inquiry to inquire and report on two main issues: (1) which government or organization should accept responsibility for rehabilitating the areas of phosphate land worked out in the periods covered by the German administration, the League of Nations mandate, the Japanese occupation, and the United Nations trusteeship; and (2) the cost and feasibility of any proposed rehabilitation. Christopher Weeramantry, then a Professor of Law at Monash University in Melbourne, chaired the commission. As its lawyer member, he was primarily responsible for writing the parts of the report of the commission dealing with legal issues. The present book is a lively summary of the legal arguments regarding responsibility in the report the commission rendered to the Government of Nauru in 1988⁴ and includes sufficient factual background to place the arguments in context.

The commission concluded that the three partner governments were obligated

3. See David North, *Where Has the Money Gone?*, PAC ISLANDS MONTHLY, Aug. 1993, at 25.

4. The Nauruan Government did not respond to a request for a copy of the full report. It presumably discusses the legal arguments as well as questions of the technical feasibility of rehabilitation. The latter issue is not addressed in Weeramantry's summary.

under principles of state responsibility to rehabilitate the lands mined out during their stewardship. Weeramantry's book discusses a number of theories affirming this obligation, including basic principles of trusts; the express provisions of article 22 of the Covenant of the League of Nations,⁵ article 76 of the Charter of the United Nations,⁶ and their spirit and intent; the undertakings under the mandate and trusteeship agreements; abuse of power and undue enrichment; violation of sovereignty over natural resources; and violations of principles of environmental law. Weeramantry does not fully flesh out all of these arguments, but the case he makes is very persuasive.

The report of the commission led to the proceedings in the International Court of Justice known as *Certain Phosphate Lands in Nauru (Nauru v. Australia)*. The book does not discuss these proceedings, now settled,⁷ but some reference to them helps place the book in context. Steering through all of the procedural and substantive shoals must have been a nightmare for the Republic's advisers, and the proceeding certainly seemed like a long-shot. Nauru is not a member of the United Nations, and it was therefore necessary for Nauru to become a party to the Statute of the Court pursuant to article 93 of the United Nations Charter.⁸ Nauru deposited its instrument of acceptance of the Statute on January 29, 1988,⁹ and made a broad declaration accepting the compulsory jurisdiction of the Court the same day.¹⁰ It lodged an application against Australia with the Court on May 13, 1989, essentially adopting the arguments contained in the Weeramantry book. The court dismissed Australia's preliminary objections in June 1992.¹¹ Australia based its most serious objections¹² on the absence from the proceeding of New

5. LEAGUE OF NATIONS COVENANT art. 22, para. 1, provided:

To those colonies and territories which as a consequence of the late war have ceased to be under the sovereignty of the States which formerly governed them and which are inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world, there should be applied the principle that the well-being and development of such peoples form a sacred trust of civilization and that securities for the performance of this trust should be embodied in this Covenant.

6. U.N. CHARTER art. 76 proclaims as "basic objectives" of the trusteeship system "to promote the political, economic, social and educational advancement of the inhabitants."

7. *Rocky Road*, *supra* note 1.

8. U.N. CHARTER art. 93, para. 2, provides: "A state which is not a Member of the United Nations may become a party to the Statute of the International Court of Justice on conditions to be determined in each case by the General Assembly upon the recommendation of the Security Council." The General Assembly adopted the appropriate resolution of approval on November 18, 1987. 1990-1991 I.C.J. Y.B. No. 45, at 55 (1991).

9. 1990-1991 I.C.J. Y.B. No. 45, at 55 (1991).

10. *Id.* at 91.

11. *Certain Phosphate Lands in Nauru (Nauru v. Austl.)*, 1992 I.C.J. 240, 268 (June 26).

12. Australia also based some arguments on the circumstances surrounding the "settlement" reached at independence, upon the role of the Trusteeship Council as arguably the sole mode of resolving trusteeship disputes, and on the delay in bringing the proceedings. *Id.* at 247-53. These arguments were all dismissed by an overwhelming majority of the Court. *Id.* at 268. In its memorial Nauru also laid claim to the Australian share of the final distribution of the overseas assets of the British Phosphate Commissioners made by the three powers in 1987. *Id.* at 265. This claim had not been expressly made in its application and was dismissed by the Court on the basis that it amounted to a new claim and that the subject of the dispute originally submitted to the Court would be transformed if the Court entertained the claim. *Id.* at 267.

Zealand and the United Kingdom, her two colonial partners.¹³ In a situation where the Australians had wielded the laboring oar in the administration since 1920, the majority of the Court distinguished its decision in the *Monetary Gold* case¹⁴ and held that the absence of the other two countries did not bar further proceedings. After the book was written and accepted for publication, Professor Weeramantry became Judge Weeramantry of the International Court of Justice. He did not participate in the preliminary objections phase of the case.

The story of Nauru is a microcosm of our time. It raises some of the most fundamental legal and political issues of the late twentieth century—among them, the aftermath of colonialism, the transfer of resources, the relationship of a people to its land, protection of the environment, the nature of state responsibility, the question of remedies under international law, and the role of third-party dispute settlement.

One of the many issues on which this fine study should stimulate further debate is the performance of the Trusteeship Council (and before it the Permanent Mandates Commission) in protecting the inhabitants of trust territories. Much of the literature on the Council is relatively laudatory. After all, the mandate/trusteeship system established the principle of international accountability through a regular reporting system. The trusteeship system included a fairly sophisticated examination of petitions and regular visiting missions to the territories. The Trusteeship Council was involved in referendums and other efforts to assess the will of peoples under the system. But one has to wonder how far the system was protecting the interests (and territories) of the inhabitants of the Marshall Islands as the United States conducted its nuclear testing there in the forties and fifties—the legacy of which still remains. One has to wonder how well the Republic of Palau has been protected in its struggle to maintain its nuclear-free constitution in the face of opposition from its administering power.¹⁵ One has to wonder how well the Council protected the interests of the Northern Mariana Islands as it entered into a permanent relationship with the United States without any serious effort to

13. I have not seen any official explanation of why the other two countries were not joined. The New Zealand acceptance of the jurisdiction of the Court, however, contains an exception of disputes in respect of which any other party to the dispute has accepted the compulsory jurisdiction of the International Court of Justice only in relation to or for the purpose of the dispute; or where the acceptance of the Court's compulsory jurisdiction on behalf of any other party to the dispute was deposited or ratified less than twelve months prior to the filing of the application bringing the dispute before the Court . . .

1990-1991 I.C.J. Y.B. No. 45, at 92 (1991). The United Kingdom's acceptance contains an almost identical exception and also excepts "disputes with the government of any other country which is a Member of the Commonwealth with regard to situations or facts existing before 1 January 1969." *Id.* at 105. (Nauru is a special member of the Commonwealth.) Under the settlement, Nauru assigned all its claims against the United Kingdom and New Zealand to Australia. *Rocky Road*, *supra* note 1. Apparently they had not been persuaded to contribute to the settlement beforehand.

14. *Monetary Gold Removed from Rome in 1943* (Italy v. Fr., U.K. and U.S.), 1954 I.C.J. 19, 32 (June 15) (Court unable to proceed where interests of party not before the Court would "form the very subject-matter of the decision").

15. R. CLARK & S. ROFF, *MICRONESIA: THE PROBLEM OF PALAU* (Minority Rights Group Report No. 63, 2d ed. 1987).

consider whether the United Nations' own standards for an acceptable exercise in self-determination had been fulfilled.¹⁶

If Weeramantry and the Nauruans are right, supervision of the Nauru Trust was of a piece with these less than heartening cases. Just as the Marshall Islanders and the Palauans seem to have made more than their fair contribution to the defense of the "free world," so do the Nauruans appear to have made a disproportionate contribution to the agricultural well-being of their administering powers—to the fields of England, the wheat lands of Western Australia, and the grasslands and pine forests of New Zealand. Who was watching on behalf of the Nauruans? Well, strangely enough, a few people were. Their views were simply drowned as the majority of the Council went along with what the administering powers wanted. Chapter 9 of Weeramantry's book is entitled (ironically?) "Trusteeship: Theory and Practice." It contains a number of statements and questions by representatives of countries such as India, Guatemala, the USSR, Liberia, Mexico, and Haiti, which showed that somebody was watching as the foxes guarded the chickens. But not enough of them!

This book is full of outrage, the way Nauru was once full of phosphate. It is worth mining.

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Die Deregulierung des Linienluftverkehrs im Europäischen Binnenmarkt [The Deregulation of Scheduled Air Transport in the European Single Market]

By Georg W. Wenglorz. Heidelberg, Germany: R.V. Decker's Publishers, 1992, pp. xvi, 166, DM88.00.

The European Single Market has been in existence since January 1, 1993. On the same date, with few exceptions, the third phase of the liberalization of the

16. Roger S. Clark, *Self-Determination and Free Association: Should the United Nations Terminate the Pacific Islands Trust?*, 21 HARV. INT'L L.J. 1, 75-78 (1980). Note the way the Security Council (the ultimate authority in that instance) swept the issue under the carpet in its discussion of terminating the trust, refusing even to hear the views of the governor of the Northern Marianas. See U.N. Docs. S/22034 (1990) and S/PV.2972 (1990).

European Community (EC) scheduled air services came into effect. At the present moment, an assessment as to the actual effects this liberalization will have on the European aviation industry cannot be made.

The disappearance of the traditional phenomenon of the "national carrier" need not be synonymous with the elimination of the still existing national carriers from the market. Although some of these carriers will certainly disappear in the coming decade, European air traffic will ensure its own survival, generally speaking, through cooperations and mergers (also with overseas partners).

Although Georg Wenglorz's work, *The Deregulation of Scheduled Air Transport in the European Single Market*, dates from 1992, it has not lost any of its topicality, at least not for the reader who is able to add to the picture outlined by Wenglorz events that have occurred subsequently. Credit is due to the author initially for his meticulous record of the development of European liberalization. However, in the second chapter, in which the subject of deregulation is explained, this reviewer admittedly had hoped for a brief comparison with American deregulation, especially since the author uses this term throughout rather than the term "liberalization," which is more often used for the European development.

The account of the development from the legal beginnings (the Chicago Convention/Bilateral agreements) up to the EC Treaty and the first memorandum of the Commission is excellent. Additionally, the description of the background and content of the first and second stages of liberalization is also dealt with very graphically.

The interested reader will find Chapter X nothing short of absorbing. In this chapter, Wenglorz attempts to outline a model example of the aviation free market system within the European Single Market. The danger of such an undertaking is, of course, that it must be measured against the reality. Whether the reality will develop in the same direction as the author's model example is certainly doubtful. Generally the ideal and the reality seldom coincide, particularly if one adopts a strict economic stance, such as that adopted by the author. For example, the author expresses the following opinions: the "exemption of tariff coordination . . . is to be ended without replacement" (p. 144); an "effective subsidy control by the Commission [cannot] be dispensed with" (p. 145); "prices should be deregulated" (p. 145); "the question of security and its supervision can, and should be, regulated separately from the question of price formation" (p. 145); and the "agreement on tariffs between the commercial aviation companies [must] be abolished" (p. 145). The author adds that "[t]he permission for the aviation companies in the Community to fly over any inner-community routes they choose to serve, should be called for" (p. 146) and "[f]urthermore, the system of naming airline companies after the particular nation state . . . should be abolished in relation to inner-Community air traffic" (p. 146). In respect of capacity the author states that "all national restrictions must be lifted" (p. 147).

The main points of the measures demanded by the author can now be found in the content of the third liberalization phase, in which the model example of the

author has already been realized to a large extent. However, this realization has only occurred as far as the legal aspects are concerned. The question of whether the desired results will take place and more competition will actually ensue still remains to be seen. At the moment, the possibility that events in Europe will be a repetition of those in the United States cannot be ruled out: the battle of the giants leads not only to the downfall of a few competitors, but leaves the remaining companies economically battered—or rather, more battered than they already are. A division of the market, that is, less competition, would be the immediate unavoidable outcome.

Furthermore, it is difficult to assess how the airline companies of non-Member States, whose connection with the new aviation free market system is (correctly) demanded by Wenglorz, will cope with this development. The EC has just concluded a treaty with Norway and Sweden at the level of the second liberalization phase, which is justifiable in view of their connection (Scandinavian Airlines System) to the EC Member State Denmark. The European Free Trade Association (EFTA) states have applied for a connection at the level of the first liberalization phase; Hungary is hesitating over at which stage it should enter. A prognosis on the survival of the airline companies of these states may be gloomy in any case with the complete liberalization contemplated by the author. The reviewer finds it difficult to describe such a situation as a “model example.” Independently from such differences of opinion, Wenglorz’s work is, even on this issue, of great importance. The development up to January 1, 1993, is not only the past, but for the potential Members of the EC is also the present and probably the future.

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Comparative and Private International Law: Essays in Honor of John Henry Merryman on His Seventieth Birthday

Edited by David S. Clark. Berlin, Germany: Duncker & Humblot, 1990, pp. xxii, 450, DM198.00.

The contributions to this edition of essays in honor of John Henry Merryman reflect the variety of fields of law covered by Merryman’s scientific work as well as the origin of authors who have been influenced by Merryman throughout the

world. The greater number of essays deal with comparative law, the area in which scholars have made most productive use of Merryman's work.

In his introductory *laudatio* Mauro Cappalletti gives a very personal picture of his acquaintance and friendship with Merryman. This encounter in the early sixties between a young European lawyer, at variance with the dogmatic attitude at home, and the realistic attitude of an outstanding American lawyer is typical of the fascination felt by a whole generation of European lawyers.

In part one of the book, *John Henry Merryman and Comparative Law*, David S. Clark, co-author with Merryman of *Comparative Law: Western European and Latin American Legal Systems*, starts with a scrutinizing view of one of Merryman's central themes in his essay, *The Idea of the Civil Law Tradition*. "Tradition" is opposed to systems, a distinction that is characteristic in Merryman's work. The broader concept of tradition allows a better insight into the different legal systems in Europe in convergence.

In the next essay Héctor Fix-Zamudio undertakes an account of the state of the art of comparative law and the place Merryman occupies in it in *John Henry Merryman and the Modernization of Comparative Legal Studies*. Symptomatic of this contribution from the Latin world, where realistic attitudes toward law offer important enrichment, is the reminder of the formal dimension of law. The interest in legal tradition is a complement, not an alternative, to comparison of law. Only when the author deplores the lack of educative material in comparative law does he make a weak point.

In his article *Some Thoughts on Comparative Legal Culture* Lawrence M. Friedman takes up Merryman's central theme. He opposes a traditional comparison of law that moves from legal rules as its units to a comparison on a more comprehensive level. The comparison of legal cultures is not the comparison of the legal systems as they are known from the traditional classifications. Legal culture is determined by social structure. Friedman is conscious of how demanding the task is. To approach a comparison of legal cultures he offers mostly hints of where criteria could be found. In a realist attitude he finds the best evidence of legal culture in a mix of behavioral indicators and careful surveys of attitudes.

The second part of the book, *Comparisons of Legal Systems*, begins with an impressive piece of comparison by Hans W. Baade, *Springs, Creeks, and Groundwater in Nineteenth-Century German Roman-Law Jurisprudence with a Twentieth-Century Postscript*. Despite its title, this contribution's scope reaches from Mexico to Germany in its synchronous dimension and from Roman to modern law in its diachronous dimension. It covers geographic, climatologic, social, and other aspects of the theme and delivers a detailed example of the difficulties of abstract rule forming. Baade also provides a short sketch of the development of German private law in the nineteenth century. Baade creates a dramatic dimension to the essay when at the end, he returns to Ulpian's commentary, quoted at the beginning of the essay, thereby closing the circle—modern

hydrology having changed the basic understanding of the problem. Nothing seems to be wrong with traditional comparison if done with such erudition.

Mirjan Damaška in *Atomistic and Holistic Evaluation of Evidence: A Comparative View* presents a short survey offering a clue to the understanding of the distinctions between the Anglo-American and the Continental legal process—a contrast lawyers outside the United States are familiar with at least from television series. Damaška shows, after theoretical and historical elucidations, the implications of the different approaches to evaluation of evidence involved in the administration of criminal and civil justice.

In another article, *American and European Models of Constitutional Justice*, Louis Favoreu stresses the difference between the American “judicial review” and the European “constitutional review.” He concludes that a divergence in the understanding of the nature of legal orders is the basis for the difference, not to mention institutional and political factors. Before enumerating common elements in the American and the European model, the author points out their distinctive features. Among these the most important seem to be the placing of constitutional litigation outside the judicial power in Europe and the *erga omnes* effect of the decisions in Europe.

Gino Gorla, in his article *Samuel Livermore (1786-1833): An American Forerunner to the Modern “Civil Law-Common Law Dialogue,”* analyzes a scholar who documents in his writings a mind that comprises both legal traditions. Gorla concludes that civil law offers the scientific instruments needed also in the formation of common law-systems.

Carlos José Gutierrez in *La Constitución Norteamericana como Ley Importada en Costa Rica* adds an argument to the importance of legal tradition in comparison of law. Even though the constitution of Costa Rica has been modeled after the U.S. Constitution, a civil law attitude towards legislative supremacy regarding legal norms maintains a strong hold in Costa Rica.

Jan Hellner deals with a rather specific problem in *Interpretation of Contracts under the Influence of Statutory Law*. The intersection of statutory interpretation and contract interpretation on one side and the impact of mandatory and facultative statutory rules on the other side create problems for which the author cannot offer one solution that would be valid in all systems. He leaves the reader with the advice to observe the development in the different areas concerned.

Hein Kötz, in his article *Scholarship and the Courts: A Comparative Survey*, follows Merryman’s advice to open the view of comparative science and continues work done by Merryman himself. His subject is the citation practice in judgments that differs in a characteristic manner in different countries. Kötz has no ready explanation, but his observations and his speculations about possible reasons give a plausible first orientation and valuable indications for everyone who works in this field.

Latvia’s 1937 Civil Code: A Quest for National Identity, by Dietrich André Loeber, turns our attention to a region hidden from the interest of legal science

for half a century. In his short sketch Loeber helps to close the gap. The national identity of one of the Baltic states is the subject here, but it should be clear that this is a facet of European legal identity.

The longest article of the collection is Inga Markovits's *Socialism and the Rule of Law: Some Speculations and Predictions*. The author herself has been surprised by the categorical decline of socialism during the last years; she states this in a postscript. Nevertheless her article has not become legal history overnight. To the contrary, her meticulous comparison and the insights she achieves raise the fear that with vanishing socialism an incentive for comparison and consciousness in Western legal culture might be lost.

Barry Nicholas, in *Certainty of Price*, is concerned about different attitudes that may arise in interpretation of article 55 of the United Nations Convention on Contracts for the International Sale of Goods. After a comparative review of regulations in different legal orders and a sophisticated analysis of the problem, he states the need for certainty of price for a valid contract.

In *La justicia penal en la investigación socio-jurídica de América Latina* [Criminal Justice in Latin American Sociolegal Research] Rogelio Pérez Perdomo differentiates the picture of criminal justice in Latin America. This very open-minded account with its call for more sociolegal research reminds the geographically distant reader of a world where legal problems have a very nonacademic and painful reality.

The resemblance of institutions of Roman and English law is one of the mysteries of the legal universe. Giovanni Pugliese discusses one of these resemblances, *Ius Honorarium and English Equity*, in his contribution. In this essay he corroborates the perspective of a comparison of law that stresses the concordances. In his vision the integration of equity and common law in England would help English law and civil law to come closer on their way to harmonization.

Two of the contributions deal particularly with institutions of common law. In both cases lawyers from the civil law tradition have chosen institutes as subjects that are notoriously difficult concepts to grasp. In both articles the reader can sense a certain anxiety about getting lost in what Lord Diplock called the maze of common law, but both contributions courageously help to bridge the schism.

Denis Tallon writes about *The Notion of Contract: A French Jurist's Naive Look at Common Law Contract*. Tallon concentrates mainly on terminology used in English law that may mislead the French lawyer. Here could be added that in civil law, too, the concepts of "contract," "obligation," and "debt" are not used uniformly. The comparison with English law adds an important facet to the discussion and it demonstrates the need for further research in this field.

The second contribution dealing with institutions of common law is Justin P. Thorens's article *The Common Law Trust and the Civil Law Lawyer*. Besides the analysis of the basic principles of property in common law, this essay undertakes to list the dogmatic steps civil law has to take in order to be able to incorporate the trust. The author finds seven of them. The trust has lately attracted much

interest on the European continent as a model for security rights. In this respect Thorens's article could be understood as a warning.

Striking differences in legal culture and in the understanding of judicial procedure are brought to the surface in Yasuhei Taniguchi's *Civil Liability of Experts in Court: A Comparative Overview*. His findings are astonishing enough when—as in his article—the role of experts is inspected in such classical fields as medicine, technique, and economy. These conclusions can be alarming when the dependence on experts in new fields like information technology is taken into account. In this respect Taniguchi's article has importance far beyond questions of liability.

In a critical survey Carlos Viladés reports in *Obras de arte y Patrimonio Histórico en España: Una reforma legislativa reciente* [Works of Art and the Historical Patrimony in Spain: A Recent Legislative Reform] the content of the Spanish Historical Patrimony Law enacted in 1985. Though the law apparently shows progress in protection, the author has doubts concerning the legislative technique and he criticizes the lack of harmonization with international agreements.

The third part of the collection is titled *The Convergence and Integration of Legal Systems within Europe*. In the first essay in this part, *EEC Community-Building Under the Single European Act*, George A. Bermann examines the effects of the Single European Act. Bermann finds the Act a disappointment only for those who expected a constitutional reform of the European Community. The achievement of the Act lies for him in the means it contemplates for attaining the completion of the common internal market. He sees the neofunctionalist tradition in European cooperation continued that aims at harmonization starting from cooperation in particular sectors.

Besides his introduction, Mauro Cappelletti contributes an article, *Balance of Powers, Human Rights, and Legal Integration: New Challenges for European Judges*. In this article Cappelletti explains the reasons for the expansion of judicial review in Europe since World War II: the abandonment of the rigid *séparation des pouvoirs*, the human rights movement, and “transnational pluralism.” This last factor is documented by the reviewing activity of the European Court of Justice in Luxembourg and the European Court of Human Rights in Strasbourg. In the outcome Cappelletti sees a movement of convergence not only in Europe, but more generally in the whole Western world.

The subject of Sabino Cassese's *Toward a European Model of Public Administration* is public administrative law, a field where comparison has been rather scarce until now. The article starts from the development of Italian administrative law and the influences it got from France. In the end the scope is broadened to a general movement of convergence, where the role of the European Community is seen as one factor in addition to the similarity of social needs.

J.A. Jolowicz touches very sensitive points of harmonization of private law in the European Community when he gives an account of the background and the different implementations of the directive in his essay, *Product Liability in the EEC*. This very informed and overtly written critique points at serious shortcom-

ings in the actual legislative practice in the European Community. Even where the basic principles are agreed upon, the influence of interested parties, governments, and lobbying groups is apt to adulterate the objective of harmonization. Jolowicz sticks to his subject, product liability, but the problem is much more general. Imminent danger exists that the project of harmonization will lead to a severe loss of legal culture. If help can be expected it will be from a scrutinizing analysis like this one.

The fourth and last part of the book is titled *Private International Law*. In *Internationalism in Private International Law* Heikki Jokela first draws our attention to Jitta, an author who lived in the beginning of this century. Jitta has remained in the background of the discussion in international private law for decades, perhaps because of his internationalistic attitude, which has not been favored by influential writers. Jokela shows that actual development has produced many international instruments that directly or indirectly deal with questions of international private law. Jitta's model of thinking could help to elucidate a situation that is difficult to cope with by the various existing schools of private international law.

Stefan A. Riesenfeld writes on *Transnational Bankruptcies in the Late Eighties: A Tale of Evolution and Atavism*. Riesenfeld cites recent cases in France, Germany, England, and the United States that all demonstrate the concurrence of local and foreign creditors in cases of bankruptcy. It is fascinating to see in this report how a matter resists abstract rule-forming even where the goal seems to be clear—the *paritas creditorum*. Bankruptcy is thus not only the touchstone of private law, but also of the willingness of national legislation to recognize the rights of foreigners, thus the basis of international private law. The subtitle Riesenfeld has given to his article indicates that evolution in this field is slow and tedious.

The facts of the case reported by Kurt Siehr in *The Return of Cultural Property Expropriated Abroad* belong happily to the past. He relates a practice of the East German government that was known as a policy to obtain foreign currency. The question arises whether this violated public policy of Western Germany. The author gives a very differentiated account of the legal situation, tracing the problems on both levels, conflict rules and rules of material law.

The scientific level of discussion is—though of course not homogeneous—high throughout the contributions. Adherence to Merryman's ideas is found as well as criticism. The essays of this volume, together with the bibliography of Merryman's oeuvre in the fifth part, form a valuable basis for further discussion. In this sense the collection gives an overview of the current state of the art in an important sector of comparative law. Perhaps this is the best one can receive as a scientific birthday present.

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International Estate Planning

By Charles G. Stephenson, K. Bruce Friedman, and Nicholas S. Freud. New York, New York: Matthew Bender & Company (Erin M. Breslin, 518/487-3000), 1992, 1 looseleaf volume, updated, \$120.00.

"You can't tell a book by its cover" is a familiar aphorism. In this case, you can't tell the book by its listed authors. This book is a collection of chapters or essays, nearly all of which are written by persons other than the author-editors listed on the title page.¹ This practice is not unusual, but as the papers in the anthology vary in style and quality, the reader needs to be sensitive to variations in the usage of terminology. The author-editors and the other authors are all well regarded persons of extensive experience in international estate planning, and the general quality of the papers is quite high. Some of the chapters are written in the style of continuing legal education lectures, sometimes more general in the treatment of complex issues and not as adequately supported by source notes as one might wish.

The editorial organization of the book is excellent, with a section-by-section summary, headnote style, preceding each chapter. This summary places in context a particular problem the reader may be exploring. The introductory overview in chapter 1 is particularly helpful. The seven illustrative case studies presented in chapter 1 set the scene for recognizing potential problems, not only as regards taxation, but also as regards the interests of family members and the administrative complications that arise on the death of an estate owner. The handling of matters in both planning and administration of estates with international aspects requires constant attention to the jurisdictional reach of the different nations involved. Such attention is particularly necessary in light of the strong and divergent national policies regarding family protection in family property, as well as tax policies, because different nations are involved during a time period that extends over the lifetime of the persons interested. In this multilevel consideration of social and legal issues, the elements to be borne in mind are so multiplied by the number of persons, states, locations of assets, and time periods that advisers sometimes tend to get blindsided in their concentration on facts as they exist at the time of consultation.

Conflict of law doctrine and development, treated in chapter 2, is of particular importance in international estate planning. The jurisdictional reach of the nations

1. Only chapters 1 and 7 carry no designation of specific authorship. Presumably these were written by Stephenson, Friedman, or Freud. The authors indicated for the other chapters are: Ch. 2, Arlene Harris and Charles G. Stephenson; Ch. 3, Edward P. Nelson; Ch. 4, Norman A. Glickman and Francis A. La Poll; Ch. 5, Paul Gordon Hoffman; Ch. 6, L. Frank Chopin; Ch. 8, David J. Hayton; Ch. 9, Carl L. Estes II; Ch. 10, Glenn A. Zahler; Ch. 11, George M.U. Young; Ch. 12, Griffith Way; Ch. 13, Justin Thorens; Ch. 14, Maurice C. Cullity, Q.C.

involved can be exercised by reason of judicial power either over assets or over individuals. As a consequence, most planning techniques depend largely on the juridical location of assets.² In many instances, because of the alternative forms in which property interests may be formulated or characterized, the situs of assets is generally more easily maneuvered than are the locations or relationships of family members, their citizenship, or domicile. The persistent relationships that family members have with each other and the nations in which they live are an integral part of their individual life styles controlled by motivations and circumstances normally independent of estate planning. In modern conflict of laws, this phenomenon means that the law is often even more narrowly directed to particular issues than in other areas, and social policies may more accurately predict results than older legal precedent. As the authors point out in § 2.03, the current approach in the United States and elsewhere is to apply the law that will further the policies of the country having the dominant interest in the particular matter or narrow issue. Issues concerning the relationships involved in the concepts of domicile or habitual residence are illustrative. Few would dispute that while most married couples live together and have common domiciles, each may acquire a separate domicile if the factual circumstances and requisite intention are present.³ The suggestion that this is only "a trend in the United States toward recognizing the right of a married woman to choose her own domicile"⁴ seems a timorous reliance on older learning that has been overcome by more recent developments.

The importance of identifying the particular issue for which the applicable law is being considered is particularly significant in separating matters relating to ownership of assets by a decedent and succession of those assets at the owner's death. The distinction between the ownership concepts of marital or community property and the succession of the share of a deceased spouse needs to be clearly maintained to avoid a blurring of the analysis. In the example (p. 2-40) of a French couple selling community assets in France and moving their domicile to Virginia where they invested the proceeds of the French assets in Virginia land, Virginia would, in all probability, recognize each spouse's half interest in the Virginia land.⁵ On the death of the first to die, the succession of that decedent's share would be determined by the law applicable to succession of the decedent's estate, here Virginia, which is both the domicile of the decedent and the situs of the asset in question. Virginia would permit the devise of the decedent's share free of claims of the surviving spouse or children. This variation in the succession from French law is explained by the authors as a loss of a community property interest, but is more aptly described as a different applicable succession law. The succes-

2. See CHARLES G. STEPHENSON ET AL., *INTERNATIONAL ESTATE PLANNING* § 2.03, at 2-9 & § 2.09[4], at 2-42.

3. See, e.g., EUGENE F. SCOLES & PETER HAY, *CONFLICT OF LAWS* §§ 4.33-.35 (2d ed. 1992).

4. STEPHENSON, *supra* note 2, § 2.04, at 2-14.

5. See Uniform Disposition of Community Property Rights at Death Act § 1.1, 8A U.L.A. 125 (1983); VA. CODE ANN. §§ 64.1-197 to -206 (Michie 1950).

sion issue is not dependent on the law applicable at time of acquisition, as is the marital property ownership, but rather on the circumstances of the decedent at the time of death.⁶

A somewhat analogous blurring of the author's analysis appears in the discussion of jurisdiction.⁷ In speaking of jurisdiction of a court, care must be taken to identify the purpose for which jurisdiction is assumed, for example, to grant original probate of a will, to issue original or ancillary letters to administer local assets, to construe a will, to enforce contribution based on distribution elsewhere, to hear claims of creditors, to collect tax, or to allocate taxes paid elsewhere. Any of these procedures may involve different necessary or discretionary bases for asserting jurisdiction and the reach of any resulting decree will vary depending on the jurisdictional basis for the court's order.⁸

In somewhat of a contrast, chapters 3 and 4 are detailed discussions of the U.S. tax consequences of U.S. contacts by nonresident aliens. Both chapters provide precise information with frequent reference to underlying case, statutory, or treaty authority. While one deals with estate and gift taxes and the other income tax, the understanding of the role of treaties in these two areas is aided greatly by reading both chapters to get the "feel" of the approach likely to be taken in future cases.

Chapter 5, Transfer Taxation of U.S. Citizens and Residents with Foreign Involvement, like the prior two chapters, is very well done. The detailed discussion of the factors indicative of domicile is particularly helpful.⁹ One of the traps for the unwary attorney and client is the handling of the marital deduction for transfers to a spouse who is not a U.S. citizen.¹⁰ Many lawyers, concentrating on the fact that the decedent, or donor, was a U.S. citizen might assume the marital deduction would be available. However, because the marital deduction is in theory only a postponement of the tax payment, it is not available for direct transfers to the noncitizen surviving spouse who may die outside the United States, beyond the U.S. tax collector's reach. The author treats this matter in detail, including the utilization of the Qualified Domestic Trust which satisfies the purpose of the marital deduction by assuring the collection of the U.S. estate tax on the death of one or other spouse.¹¹

Chapter 6, Multijurisdictional and Separate Situs Wills, is a good commentary on single or separate wills dealing with assets in different countries. This chapter presents most of the advantages and disadvantages relating to each and cautions

6. However, in their next example (STEPHENSON, *supra* note 2, § 2.09[4], at 2-42), involving forced shares of a decedent's family member, the distinction between ownership and succession issues seems to be recognized in the quasi-community property setting.

7. *Id.* § 2.06, at 2-23 to -24.

8. *Cf. id.* § 2.07, at 2-30.

9. *Id.* § 5.03[c], at 5-8.

10. *Id.* § 5.05, at 5-16.

11. *Id.* § 5.06.

the reader on the care necessary in the use of separate wills for assets in different jurisdictions. The problems incident to revocation issues and the construction of residuary clauses would appear sufficient to deter the use of separate wills in any but the most unusual circumstance.

The chapter 6 discussion of habitual residence as used in the 1988 Hague Convention on the Law Applicable to Succession of Estates of Deceased Persons suggests the ambiguity surrounding intent as an element in both domicile and habitual residence. In both the American concept of domicile of choice¹² and the concept of habitual residence as used by the Hague Conference¹³ intent is a factor in identifying the person's home and center of living, the attitude that forms the genuine focus of the person's personal affairs. It is not an expression of intention to obtain or retain a "legal domicile," and these latter expressions or declarations are usually regarded as of minor weight. In using habitual residence the Hague Convention emphasizes those facts that evidence factors indicative of the person's primary home, including the mental attitude making it the center of personal life. Those facts control, thus avoiding the older view, particularly as reflected in English law, of revival of domicile of origin and of requiring intent to remain permanently. This reviewer submits that domicile of choice as currently developed in American law and habitual residence as used in the Hague Convention are nearly identical.

The author of chapter 6 raises a major difficulty that follows from the scission of traditional U.S. conflict of laws rules in referring to situs of immovables (real property) and to domicile for movables (personal property) in succession.¹⁴ The matter of characterizing modern investments such as bonds, mortgages, cooperatives, limited partnerships, condominiums, time shares, and trust interests as real or personal property is an uncertain, difficult, expensive process that invites manipulation and retaliation in international estates. Fortunately, in much of the world scission is avoided, and in the United States, the courts and legislatures are moving to limit the situs rule to its reasonable application. Serious conflicts scholars have long criticized the situs rule,¹⁵ and many authorities have recognized that the state in which land is located has a reasonable interest in regulating land use, title records, and taxation, but except for matters of national security, has little

12. See *id.* § 2.04; see also SCOLES & HAY, *supra* note 3, § 4.14, 4.20.

13. Donovan W.M. Waters, *Explanatory Report, Hague Convention on the Law Applicable to Succession to the Estates of Deceased Persons* para. 51 (art. 3), in 2 HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, PROCEEDINGS OF THE SIXTEENTH SESSION 549 (1990).

14. STEPHENSON, *supra* note 2, § 6.05[2], at 6-17; see also A.N. Yiannopoulos, *Movables and Immovables in Louisiana and Comparative Law*, 22 LA. L. REV. 517 (1962).

15. Moffatt Hancock, *In the Parish of St. Mary le Bow, in the Ward of Cheap*, 16 STAN. L. REV. 561 (1964); Russell J. Weintraub, *An Inquiry into the Utility of "Situs" as a Concept in Conflicts Analysis*, 52 CORN. L.Q. 1 (1966); J.H.C. Morris, *Intestate Succession to Land and the Conflict of Laws*, 85 L.Q. REV. 339 (1961); Peter Hay, *The Situs Rule in European and American Conflicts Law—Comparative Notes*, in PROPERTY LAW AND LEGAL EDUCATION—ESSAYS IN HONOR OF JOHN E. CRIBBIT 109 (Peter Hay & Michael H. Hoeflich eds., 1988).

or no interest in the allocation of ownership interests among family members.¹⁶

In international estates nearly all U.S. states and most developed nations, without regard to the nature of the assets, recognize wills that satisfy the formalities of the place of execution or the habitual residence (domicile) of the testator either at the time of execution or time of death.¹⁷ Parties will have difficulty invalidating a will that was validly executed under any law a prospective testator would contemplate. The remaining primary issue in succession of international estates relates to family protection, that is, the forced share for spouse and children. Nearly half the American states have statutory choice of law rules as to the entire estate referring this issue to the domicile of the decedent at death as the most significantly interested state.¹⁸ Most of these statutes are patterned after section 2-201(c) of the Uniform Probate Code.¹⁹ Only by this unitary reference can the state that is most concerned with the family give effect to its policy concerning family protection in the entire estate of a deceased person.²⁰

In chapter 6 the author observes that "secrecy and the limitation of claims are two of the primary purposes of separate wills."²¹ Without considering the prickly issues of the propriety of assisting a client to avoid creditors whose assets have contributed to the estate, one should note that the constitutional obligations of notice to creditors afford a substantial reason for utilizing the single will.²²

Chapter 7, *Income Taxation of Foreign Trusts*, is a detailed treatment of tax and reporting obligations regarding foreign trusts, including the complexities of accumulation distributions utilizing the throwback rules.

Chapter 8, *Trusts Under Civil Law Jurisdictions*, discusses the utilization of Anglo-American trusts under the Hague Convention on the Law Applicable to Trusts and on their Recognition (1985) and in civil law states that are not parties

16. See Eugene F. Scoles, *Choice of Law in Family Property Transactions*, 209 RECUEIL DES COURS 11, 63 (Hague Academy of International Law, 1988).

17. See STEPHENSON, *supra* note 2, § 6.04, at 6-11.

18. See, e.g., ALA. CODE § 43-8-70 (1991); ALASKA STAT. § 13.11.070 (1985); CAL. PROB. CODE § 120 (Deering 1991); COLO. REV. STAT. § 15-11-201 (1990); DEL. CODE ANN. tit. 12, § 901(b) (1987); ME. REV. STAT. ANN. tit. 18-A, § 2-201(b) (West 1964); MICH. COMP. LAWS § 700.282(b) (1980); MINN. STAT. § 524-2-201(b) (1986); MONT. CODE ANN. § 72-2-702 (1991); N.D. CENT. CODE § 30.1-05-01 (1976); OR. REV. STAT. § 114.105 (1990); PA. STAT. ANN. tit. 20, § 2202 (1975); S.D. CODIFIED LAWS ANN. § 30-5A-1 (1984); UTAH CODE ANN. § 75-2-201 (1993); WIS. STAT. § 766.75 (1993); WYO. STAT. § 2-5-101 (1977).

19. UNIF. PROB. CODE § 2-201(c) (1990): "Non-Domiciliary. The right, if any, of the surviving spouse of a decedent who dies domiciled outside this State to take an elective share in property in this State is governed by the law of the decedent's domicile at death."

20. See, e.g., N.Y. EST. POWERS & TRUSTS LAW § 5-1.1-A(C)(7) (Consol. 1992), effective Sept. 1, 1992, identifying the decedent's assets from which the surviving spouse may claim is most direct: "The decedent's estate shall include all property of the decedent, wherever situated." Cf. UNIF. PROB. CODE §§ 2-201, 2-202, 2-205 & 2-207; Eugene F. Scoles, *Conflict of Laws and Nonbarrable Interests in Administration of Decedents' Estates*, 8 U. FLA. L. REV. 151, 172 (1955); see also Sullivan v. Burkin, 460 N.E.2d 572, 577 (Mass. 1984).

21. STEPHENSON, *supra* note 2, § 6.06[2], at 6-21.

22. See Tulsa Professional Collection Servs., Inc. v. Pope, 485 U.S. 478 (1988); cf. Blake v. McClung, 172 U.S. 239 (1898).

to the trust convention. The discussion helpfully cautions readers about the overriding effect of matrimonial property in civil law jurisdictions. The utilization and limitations on alternatives or analogous arrangements are explored in imaginative fashion.

Chapter 9, Asset Protection Trusts for Foreign Persons, deals with protecting the assets of the actual or potential economic or political foreign refugee. This chapter includes a sophisticated discussion of the Act of State Doctrine, its exceptions, and modifications in connection with trusts designed to avoid expropriation by a foreign government. This chapter is one of the most detailed and informative in the volume even though it deals with some rather unusual circumstances. Of particular value is the author's development of the concepts and utilization of a trust "protector" as an independent "advisor" or holder of power to name a successor trustee or to move the trust situs. The chapter includes valuable suggested forms and drafting techniques.

Chapter 10, Reporting and Disclosure Requirements for Foreign Persons, details the necessary tax returns regarding sources of income in the United States together with the nontax disclosure requirements of foreign investors under other laws of the United States.

Chapter 11, England and Wales, is the first of the final four chapters presenting, on a country-by-country basis, the law most relevant to the American estate planner. Chapter 11 is a helpful outline of succession law and estate administration as well as the law on tax obligations and payment. Particularly emphasized are the differences between England, a common law jurisdiction, and Scotland, which has civil law in large measure. Both systems are compared to those of Northern Ireland and Wales. One of the most valuable portions of this chapter describes England's summary process of obtaining probate and letters. The English procedure is so simple it may surprise many American practitioners in states that have not adopted the somewhat analogous provisions of the Uniform Probate Code.

Chapter 12, Japan, presents an interesting comparison of the traditional American system of estate administration and that of Japan, which utilizes the civil law system of universal succession. Under the concept of universal succession the successors, testate or intestate, pay debts and taxes and arrange distribution pursuant to the will or statute without court intervention. The chapter explains Japan's tax law in detail.

Chapter 13, Switzerland, describes that country's particularly complex setting of federal law governing succession and choice of law, while Canton law controls the tax structure. The civil law system of universal succession and forced heirship exist in Switzerland, but the surviving spouse also has a forced share of the decedent's portion of the marital property. While Swiss law does not provide for trusts as the Anglo-American common law knows them, its courts and legal professionals have considerable experience with foreign trusts and local alternative arrangements. A significant factor is the general recognition of choice of law clauses, or *professio juris*, by which one can choose to have the courts apply the

law of either the testator's domicile or nationality. The Hague Convention on the Law Applicable to Succession of the Estates of Deceased Persons takes this later approach.

Chapter 14, Canada, details the Canadian tax system, which has no estate or inheritance tax as such, but does have both federal and provincial income taxes that include capital gains. For most persons the appreciation of assets is taxed whenever a transfer or a "deemed" transfer occurs, against which the parties credit the general lifetime exclusion of \$100,000. The substantive law of the provinces, other than Quebec where civil law obtains, is patterned after English law, including family protection similar to the English Family Provision Act. Important variations occur among the provinces, but most follow earlier English practice with regard to probate and estate administration. Local ancillary administration must usually be had of assets in Canada belonging to a decedent domiciled elsewhere. An interesting aspect of the Canadian income tax on capital transfers is the provision that trusts are deemed to dispose of capital assets every twenty-one years, and any appreciation tax, if not attributed to beneficiaries, is taxable to the trust. The legislative pattern for this tax still is unsettled and calls for careful review.

As was suggested at the outset, this book differs from a traditional treatise. It is broad ranging and the various authors have somewhat dissimilar approaches. However, the editorial organization brings the variant parts together to give rational unity to the symposium. The fact that nearly all the chapters are well done makes the book a valuable and readable addition to the library of the lawyer whose clients have international contacts and concerns.

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